IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-356

CALL CARL, INC., et al, *Petitioner*

v.

BP OIL CORPORATION

—and—

THE STANDARD OIL COMPANY (OHIO), *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner Call Carl, Inc., et al. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 26, 1977 and the Order denying Petitioner's Motion for Rehearing and Suggestion for Rehearing *en banc* on June 6, 1977.

OPINIONS BELOW

The citation for the Opinion of the Court of Appeals is 1977-1 Trade Cases, ¶ 61,401 and appears in the Appendix hereto. The citation for the Opinion of the

United States District Court for the District of Maryland is 403 F.Supp. 566 (D.C.Md. 1975) and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 26, 1977. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on June 6, 1977, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (I).

QUESTIONS PRESENTED

1. In light of this Court's decisions in *Continental TV, Inc.* v. *GTE Sylvania, Inc.* and *Albrecht* v. *Herald Co.*, did the Fourth Circuit err in ruling that a supplier as a matter of law can terminate its independent dealers for the purpose of fixing retail prices?

2. Did the Fourth Circuit deny Petitioners their Seventh Amendment right to a trial by jury by setting aside a jury verdict and supporting opinion of the Trial Court on a claim over which the court had only pendent jurisdiction?

3. Does the Court of Appeals have a right to hear an appeal from a *remittitur* filed under protest where the party in favor of whom the *remittitur* was granted appealed the decision on other grounds?

STATUTORY PROVISION INVOLVED

Federal Antitrust Laws—Section 1 of the Sherman Act—Statute 15 USC § 1

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: ***

STATEMENT OF FACTS

Petitioners are individuals and corporations which were independent service station operators under franchise agreements with BP Oil Corporation (BP). Respondents are Standard Oil of Ohio (SOHIO), a major marketer and refiner of gasoline, and its wholly owned subsidiary BP.

Each Petitioner successfully operated a BP service station from a minimum of three years for some to fifteen, twenty and twenty-five years for others under automatically renewable one year franchise agreements.

Each Petitioner signed a new agreement sometime between April and July of 1973. They alleged, and the jury so found, that they were induced to enter into these and previous franchise agreements in reliance upon statements of fact by agents of Respondents that if Petitioners did not violate any of the provisions of the agreements the contracts would be automatically renewed annually and they could "operate their stations forever."

At the time of the termination of the Agreements, Petitioners had adhered to the terms and conditions of their agreements "100%" and had not given BP any cause to cancel or terminate or not renew their agreements.

Petitioners were terminated solely because of a long-range marketing plan by Respondents pursuant to which the highest volume stations in the Greater Washington Metropolitan Area were to be converted to "Gas-and-Go" stations specializing in the high volume sale of gasoline at cut-rate prices without the related services ordinarily performed by full service stations.

On September 26, 1973, BP formally announced to its dealers, including the Petitioners herein, that it would implement a new marketing program which necessitated the termination of these Petitioners' franchise agreements. Petitioners' stations had been selected under the BP plan to be rebuilt and converted to BP brand gasoline-only outlets. Petitioners were offered the opportunity to remain at those stations as I-managers. As such they would be paid by BP on a commission basis. However, from such commission Petitioners would pay all the costs of labor at such stations and assume such losses as pilferage from their commissions. Petitioners declined to become I-managers.

The essential purpose for terminating Petitioners as independent dealers was to allow Respondents to fix and control the retail price of gasoline at such locations.

Each of the Petitioners refused to participate in this scheme to allow Respondents to fix the retail price of gasoline at their stations. In the implementation of this scheme, BP converted other stations in Petitioners' trading area to "Gas-and-Go" stations and obtained I-Managers from other sources. In over 50% of the stations they obtained I-managers through the use of advertising and other means, who were not and had not previously been associated in any way with

them. The remaining 50 percent were staffed by employees of BP.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Fourth Circuit Decides An Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court and Which, in Addition, Conflicts in Part With a Decision of This Court.

This Court in *Continental TV, Inc.* v. *GTE Sylvania*, 1977-1 Trade Cases, ¶61,488, exhaustively examined the problem of vertical restraints. In doing so, it reversed in part the *per se* test in *United States* v. *Arnold Schwinn & Co.*, 338 U.S. 365 (1967) and ruled that location clauses and other types of vertical restraints were subject to the rule of reason rather than to a *per se* test. However, it left unanswered the appropriate approach to those vertical restrictions that deal directly or indirectly with prices.

The time is due, Petitioners respectfully suggest, to examine such restrictions so that the Courts of Appeal will have clear guidelines in questions of this type.

The basic Supreme Court decision to date in this area is *Albrecht* v. *Herald Co.*, 390 U.S. 145, 88 S.Ct. 869 (1968). There the Court held that price restrictions of any kind were a per se violation of Section 1 of the Sherman Act.

The language in the decision of the Fourth Circuit directly conflicts with the language of the *Albrecht* Opinion.

More specifically, in addition, the Fourth Circuit held that the requisite duality was not present in this

case. This directly conflicts with fn. 6 of *Albrecht,* which indicates the kinds of duality that will support a Section 1 Sherman Act claim. Not only the Fourth Circuit, but other Circuits as well have either ignored or apparently been confused by fn. 6, and it is an area in which clarification by this Court is urgently needed.

The Fourth Circuit in this case has made an unprecedented decision that a supplier is unqualifiedly entitled to change its method of marketing at the retail level from independent operators to direct employees without regard to the purpose or nature involved or the method of accomplishing such a change. It is a decision which will undoubtedly affect scores of similar cases throughout the country in which the same issue is involved. It is an antitrust question of common application which requires clarification by this Court in order that there be uniformity throughout the country in an antitrust area in which district court cases are occurring with increasing frequency.

The thrust of Petitioners' Sherman Act claim is that Respondents, in not renewing the franchise agreements of Petitioners, engaged in an unlawful refusal to deal with Petitioners in furtherance of a scheme to fix the retail price of Respondents' brand of gasoline.

The facts were undisputed at the close of Petitioners' case in chief that the sole purpose of this decision was to enable Respondents to fix the retail prices of their gasoline.

Basil K. Taggart, formerly Respondents' Sales Supervisor in the trade area in which Petitioners operated, testified that it was Respondents' intention and understanding that they were terminating the dealerships solely in order to enable them to fix retail prices.

Taggart was told, and he understood, that Respondents could not fix dealer retail prices if Respondents converted their method of operation from a conventional service station to a "Gas and Go" type station operated by dealers.

Taggart testified:

"A . . . 1973, and we started eliminating dealers, but we knew, the company knew this was an illegal thing to do.

"You can't eliminate competition, and that is what we were doing, so we could control the price of gas.

"Q. You were eliminating what competition?
"A. We were eliminating the dealers.
"Q. And that is eliminating competition?
"A. Certainly.
"Q. That is your view of it?
"A. It is not my full definition of eliminating competition, no, but by eliminating the dealers, you eliminated anybody else—you eliminated the elements that you could not control price, and with a dealer, you cannot control price. He can price his gasoline at anything he so sees fit."

(App. at 216-217)

Further, Respondents' own expert unqualifiedly stated that price-fixing was an essential, integral and principal reason in Respondents' decision to cancel Petitioners' dealerships.

Respondents expert, John Stewart, testified:

"A. I think that the crux of it, to me, is the ability to provide some uniform control over things like the hours of operation that the stations are open, the standards that are kept, of cleanliness and service at the station, and most important, to be able to set a low price, which the company can

do if they are company operated, and it is illegal to do it if there are dealers operating them.

"So, in the long run, the company has absolutely no assurance that consumers are going to get the benefit of the fast, easy and low price that this high volume makes possible.

"So, I don't see how consumers can be assured of that low price, since it is illegal for the company to control the price at which the dealer operating a station sets the price.

"By Mr. Cohen:

"Q. You think, actually, the control of the price is essential?

"A. To be able to control it in a down-direction, yes, absolutely.

"Q. And also be able to control it in relation to what competitors are selling in the immediate area?

"A. Yes."

Respondents, both in writing and in person, notified Petitioners individually that their franchise agreements would be terminated. However, they offered each of the dealers an opportunity to become "I-managers," a device which Respondents believed would make the dealers "employees" and, therefore, enable them to control the retail price of gasoline at the stations which Petitioners had operated.

In each case, the dealers refused to accede to this request. This pattern of behavior by BP involved not only the dealers but other selected stations in the Greater Washington area.

It was the dealers' refusal to participate in this price-fixing scheme which caused the severance of their franchise relationship with BP.

The Sherman Act prohibits any conspiracy or combination between two or more persons which has as either its intended effect or probable result the unreasonable restraint of interstate trade or commerce. In this matter, such a combination or conspiracy could be found on at least two different levels as *Albrecht, supra,* held.

First, BP attempted to secure compliance with their price-fixing scheme with the dealers themselves. If the dealers had agreed to become "I-managers" and relinquish their pricing independence, they would have been guilty with BP of combining and conspiring to fix the price of the BP brand of gasoline. This would have been a *per se* violation of the Sherman Act.

Similarly, to threaten the dealers with termination and eventually terminate their independent dealerships because they refused to fix prices or because they would refuse to fix prices with BP is equally *per se* violative of the Sherman Act.

Next, regardless of BP's efforts to secure the dealers' agreement to their price-fixing scheme, BP solicited and secured the cooperation of independent third parties to operate their Gas and Go outlets.

These third parties were not employees of BP. Rather they were persons who responded to BP's advertising and other means of solicitation for the recruitment of Gas and Go managers.

Under such circumstances, these independent third parties contracted and combined with BP to operate Gas and Go outlets at prices fixed by BP.

Thus, the requisite duality existed as a matter of undisputed fact in light of *Albrecht*. As set forth pre-

viously, the decision to terminate the dealerships and substitute "I-Managers" or company employees was motivated exclusively by BP's desire to fix the retail prices of their brand of gasoline.

Where such a motive substantially contributes to a decision not to renew a business relationship, a supplier has engaged in an illegal refusal to deal in furtherance of an illegal price maintenance conspiracy.

In summary, BP first determined that it wanted to control the price of its brand of gasoline. It sought to secure the agreement of its dealers to relinquish their pricing independence and agree to have retail prices of this gasoline fixed by the supplier rather than the dealers. When the dealers refused BP's request, BP punished the dealers for their refusal by terminating and cancelling their franchises in furtherance of such effort to fix the retail price of gasoline. Termination under these circumstances clearly falls within the proscriptions of the antitrust laws and should be classified as illegal *per se,* not summarily dismissed as a matter of law.

It is essential, therefore, that this Court decide this important question of antitrust law. If it does not, the Fourth Circuit decision will stand for the unqualified proposition that a supplier is free to change its method of distribution regardless of anticompetitive intent or purpose. It can further be assumed that this decision will be followed by other Circuits, thereby substantially eroding the purpose and intent of the Federal antitrust laws.

A decision by this Court would be a logical extension of the questions left unanswered in *GTE Sylvania, supra;* prevent further erosion of the principles set

forth in *Albrecht, supra;* and clarify *Footnote 6* of *Albrecht* as it applies to the requisite duality necessary for proof of a Section 1 violation of the Sherman Act.

II. The Decision of the Fourth Circuit So Far Departs From the Accepted and Usual Course of Judicial Conduct Involving an Important Constitutional Issue as to Call for the Exercise of This Court's Jurisdiction.

The Seventh Amendment unqualifiedly guarantees the right to a jury trial in Federal cases. Less clear, however, is the standard of review by a Federal Circuit Court in claims based on violations of state law where only pendent jurisdiction is involved. Therefore, an important issue of constitutional law is involved in this case. Here the jury found, in response to Special Questions, that the Respondents were guilty of fraud and misrepresentation under the appropriate provisions of Maryland law. That decision was fully supported by the District Court Judge in an extensive opinion.

The Fourth Circuit decision has given judicial sanction to deliberate lies known as such by the Respondents when made in order to induce Petitioners to become or remain as dealers.

This Court has held that even the First Amendment does not protect deliberate lies. See *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

The nature of the lies themselves is flagrant. The uncontradicted testimony of Basil Taggart, a former employee of the Respondents, was:

> ". . . A. But I could say to him we are going to give you a one year lease, but I will guarantee you that it will be renewed year after year.
>
> "Q. That was your personal guarantee?

"A. It was more than my personal guarantee; it was the company's guarantee.

"Q. How could you say it was the company's guarantee?

"A. Because the company had instructed me to tell the dealer that, that not only was I telling it, but every other retail manager in the BP organization was telling dealers that same thing that I was telling them.

Taggart testified further that he was specifically instructed in training school by BP corporate officials that one of the principal questions he might be confronted with at the time he attempted to sign a dealer was longevity. He was instructed and trained to reply that he was to guarantee that the dealer's lease and supply agreement would be continually renewed year after year as long as the dealer continued to do his job.

Taggart testified that:

"... every corporate official has sat in our training school and heard the trainer say to the incoming dealers that as long as you operate your service station properly, your lease will be renewed automatically.

Taggart's testimony with regard to his instructions and experience in training school was never contradicted by Respondents. Many of the very persons identified by Taggart as being present in training school and who had knowledge of the representations of dealer longevity testified on behalf of BP on other matters. But none of these witnesses contradicted the testimony of Taggart or, indeed, commented on it.

Taggart further testified as to confidential BP intracorporate meetings prior to the last lease renewal of

the dealers, at which it was clearly explained to Taggart and the other sales representatives that BP was going to get rid of the dealers.

After he had this knowledge, in early 1973, Taggart went out and made the same representations regarding longevity to the dealers as he had in the past. On cross-examination Taggart stated that at the time of the last lease renewals of the dealers, he knew that his representations were a lie.

Taggart testified as follows:

"Q. And did you ever deceive any of these Plaintiffs?

"A. Yes, sir.

"Q. Intentionally deceive them?

"A. Yes, sir.

"Q. Did you lie to them?

"A. Yes, sir.

Taggart testified that not only he knew he was lying, but BP corporate officials knew he was lying.

"A. Right. Call it what you want.

"This got so bad that I even had a sales rep quit because he said if I can't face those dealers and tell them the truth, I don't want to work for the company, and he quit, and this is prior to '72, when I started really lying to the dealers that they were going to stay in the stations.

"I knew in early 1973 that these dealers were going to be cancelled. Mr. Harnett, who was Executive Vice-President of our company, knew they were going to be cancelled. He had stated that he did not want to be in Court with any of them, but he wanted us to get rid of them any way we could without getting in Court.

"Mr. Hickerson—

"The Court: I think the question was had you lied to them.

"The Witness: Yes, I had lied to them."

That lie was told to all of the Plaintiffs on numerous occasions.

Taggart's testimony was fully corroborated by other BP sales representatives.

Despite the fact that Taggart only realized that he was lying to the dealers in 1973, BP corporate officials knew that his representations to the dealers were untrue and unjustified as early as 1970 and 1971.

Charles King, Vice President of BP and Sohio, testified that it was the position of BP corporate officials that any statement with regard to dealer longevity, whether made in 1971, 1972, 1973 or 1974, was "unreasonable," "irresponsible," and "reckless."

Thus, at the time Taggart was making statements as to dealer longevity, the position of BP corporate officials was that such statements were "unreasonable, irresponsible and reckless." BP knew that its supervisors were making those representations. It also knew that as a practical matter the supervisors had to make those representations in order to secure and retain good dealers. It knew, at the time they were made, that these statements and representations were lies.

The Fourth Circuit in its Opinion sanctions these lies on the grounds that the misrepresentations merely constituted an "oral expectancy" that was "known" to be contrary to the terms of a written agreement.

In fact, these misrepresentations were neither contrary to the written agreement, nor did they constitute an "oral expectancy." The appropriate portion of the agreement provides that the lessor demises and leases unto the lessee certain properties identified therein "for and during the following term:"

> "One (1) Year beginning on the 15th day of May, 1973, and *thereafter for successive terms of one year each,* provided, however, that either party may terminate this lease at the end of the first one year term or any successive yearly term on Thirty (30) Days' written notice given prior to the end of any such term." (Emphasis supplied)

Thus, the agreement itself expressly contemplates that its duration shall be longer than one year. On its face, it plainly contemplates an initial term of one year and thereafter successive terms of one year each. Termination is not based on a specific term, but rather on the provision of written notice prior to the end of any term. It is plainly and clearly ambiguous in regard to the circumstances under which such written notice would be given, insofar as the lessee dealers are concerned by the lessor company.

The agreement, of course, was drafted by the lessor—Respondents—and any ambiguity must be construed, therefore, against the maker of the agreement and parol evidence is admissible to explain the ambiguity.

It is only reasonable and natural—and BP so expected, as shown by the testimony of Taggart quoted above—that the dealers, or indeed, any businessman making a substantial investment in a business, would want to know the circumstances for which the contract

would be terminated at the end of any of its successive terms.

BP sales representatives expected such a question and were trained to answer such a question in its training school as they did in this case. In other words, BP itself recognized that the ambiguity existed and its representations would have to be made to explain such ambiguity to potential or present dealers.

The false statements explained present contractual language and company policy that the agreement signed by the dealers would be automatically renewed yearly unless the dealer violated a substantive provision of such agreement.

No case cited by the Fourth Circuit concerns a factual situation similar to the one herein where the oral fraudulent statements made were consistent with and explanatory of language in a written agreement concerning the meaning of an existing provision regarding the duration of that agreement.

What the Fourth Circuit has done is to rule that knowingly false statements of facts as to the duration and renewability of a franchise agreement cannot as a matter of law constitute fraud. This is contrary to the law in all states, including Maryland, and runs contrary to public policy. Further, it makes the Federal Court an instrument for sanctioning deliberate lies made for the purpose of inducing existing and potential franchisees to make investments in a business for the benefit of the party engaging in such lies.

Under the circumstances, the effect of the Fourth Circuit opinion is to effectively deny Petitioners the right to a decision by a jury of their peers. Petitioners

suggest that where only a state claim is involved and the case is heard by a federal court as a result of pendent jurisdiction, the standard of review by a federal court should be more narrow than it would be in a case involving a Federal question. In such a case the discretion of the reviewing Court should be more circumscribed than in a case involving a Federal question. Here, if anything, the contrary has occurred and the applicable standards utilized by the Fourth Circuit deny Petitioners' their constitutional right to a jury trial.

III. The Fourth Circuit's Opinion Directly Conflicts with Decisions of Other Circuits.

In regard to the appeal of a *remittitur* filed under protest, particularly where a party in favor of whom the *remittitur* is entered is appealing on other grounds, the Circuits are in direct conflict. The Fifth Circuit has held in *Steinberg* v. *Indemnity Insurance Company of North America*, 364 F.2d 266 (5th Cir. 1966), that a *remittitur* filed under protest is appealable. See also *Wiggs* v. *Courshon*, 485 F.2d 1281 (5th Cir. 1973); *United States* v. *1160.96 Acres of Land*, 432 F.2d 910 (5th Cir. 1970); *Gorsalitz* v. *Olin Mathieson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970). See also *Edwards* v. *Sears Roebuck and Co.*, 512 F.2d 276 (5th Cir. 1975).

The Sixth Circuit, following applicable state law, has also allowed the appeal of such *remittiturs*. See *Manning* v. *Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973).

The Seventh Circuit, however, has held—as the Fourth Circuit has done in this case—that the plaintiff loses his right to appeal once he consents to remit. See *Collum* v. *Butler*, 421 F.2d 1257 (7th Cir. 1970); *Roths-*

child v. *Drake Hotel, Inc.*, 397 F.2d 419 (7th Cir. 1968); *Dorin* v. *Equitable Life Assurance Society*, 382 F.2d 73 (7th Cir. 1967).

Therefore, because there is a direct conflict in the Circuits on this basic question, a definitive decision of this Court is necessary in this area of the law.

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the Judgment and Opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

No. 76-1345

CALL CARL, INC., a Delaware Corporation, FRANCISCO DIAZ, AVELINO PESTANA, a Partnership, t/a Piney Branch BP Service Station, REMO GAGE, t/a Gage's Service Center, HOYT M. SMITH, t/a Smitty's BP, ROBERT J. COCHRANE, SR., t/a Cochrane's Shady Grove BP, R. WAYNE LOEKLE, t/a Manor BP, WILLIAM LUKSENBURG, t/a Twinbrook BP, ANGELO DELEONIBUS, SABATINO DELEONIBUS, a Partnership, t/a D&D Service, RICHARD L. STICKELL, t/a Dick's BP, and MELVIN SHERBERT, t/a Queenstown BP, *Appellants*

v.

BP OIL CORPORATION, a Delaware Corporation; and STANDARD OIL COMPANY (OHIO), an Ohio Corporation, *Appellees*

No. 76-1346

CALL CARL, INC., a Delaware Corporation, FRANCISCO DIAZ, AVELINO PESTANA, a Partnership, t/a Piney Branch BP Service Station, REMO GAGE, t/a Gage's Service Center, HOYT M. SMITH, t/a Smitty's BP, ROBERT J. COCHRANE, SR., t/a Cochrane's Shady Grove BP, R. WAYNE LOEKLE, t/a Manor BP, WILLIAM LUKSENBURG, t/a Twinbrook BP, ANGELO DELEONIBUS, SABATINO DELEONIBUS, a Partnership, t/a D&D Service, RICHARD L. STICKELL, t/a Dick's BP, and MELVIN SHERBERT, t/a Queenstown BP, *Appellees*

v.

BP OIL CORPORATION, a Delaware Corporation; and STANDARD OIL COMPANY (OHIO), an Ohio Corporation, *Appellants*

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Argued November 8, 1976 Decided April 26, 1977.

Before BRYAN, *Senior Circuit Judge*, WIDENER and HALL, *Circuit Judges*.

John Henry Lewin, Jr. (Benjamin R. Civiletti, Venable, Baetjer and Howard on brief) for Appellees in No. 76-1345 and for Appellants in No. 76-1346; Jerry S. Cohen (Michael D. Hausfeld; William C. Sammons, Tydings & Rosenberg on brief) for Appellants in No. 76-1345 and for Appellees in No. 76-1346.

WIDENER, *Circuit Judge:*

In late summer of 1973, the plaintiffs, ten independent service station operators doing business in Maryland as BP dealers, were notified by BP that their leases and franchise agreements would not be renewed when their current terms expired. Business expectations frustrated, litigation was not far behind. The operators charged BP along with its parent corporation, Standard Oil Co. of Ohio (SOHIO), with terminating their franchises as part of a price fixing conspiracy in violation of § 1 of the Sherman Act, 15 USC § 1. State law claims for breach of contract and fraudulent misrepresentation were asserted as well.

Trial was held in the district court with a jury, and at the close of the plaintiffs' case defendants were granted a directed verdict on the count alleging violations of the Sherman Act. The other counts were submitted to the jury, which found that there had been no breach of contract by the defendants, but that BP and SOHIO were liable under the Maryland law of fraud and deceit. Damages of more than 1.2 millions were awarded by the jury, about half of which was ordered remitted by the court in lieu of a new trial on the issue of damages. The district court opinions are reported as 391 F.Supp. 367 (D. Md. 1975) and 403 F.Supp. 568 (D. Md. 1975).

Appeals are taken by both sides. Plaintiffs claim the district court erred in directing a verdict on the antitrust count and in remitting approximately $600,000 of the jury's damage award. BP and SOHIO allege error in the district court's fraud and deceit damage charge, and assert that they are entitled to judgment on the merits of that count. We view plaintiffs' antitrust allegations as lacking in merit and affirm the district court's grant of a directed verdict in favor of the defendants. On the fraud and deceit count, however, we find ourselves in agreement with BP and SOHIO that the jury was erroneously instructed on the proper measure of damages in this case, and that un-

der the evidence there should have been no award of damage on the fraud count. The district court's judgment for the plaintiffs on that count will therefore be reversed.

At the time of BP's incorporation in 1969, plaintiffs Call Carl, Inc., Gage, Smith, Luksenburg and DeLeonibus had operated their service stations under the Sinclair tradename pursuant to short-term, renewable leases. When BP acquired Sinclair properties on the East Coast in 1969, it took over these leases for the remainder of their terms and, as they expired, renewed them for additional periods, with the plaintiffs becoming BP dealers. In only one instance, that of the plaintiff Smith, was a lease renewed for a period longer than one year, in accordance with BP's policy of limiting franchise agreements to one year terms.

The years 1970-1972 witnessed the expansion of BP marketing in the Washington, D. C. area through traditional franchise arrangements. During this period, BP acquired the service stations later operated by the other five plaintiffs, Cochrane, Stickell, Loekle, Sherbert, and Diaz. These five were initially given six-month leases and supply contracts that could be, and in fact were, later renewed, but again never for longer than one-year terms. Each of the plaintiffs' agreements with BP specified that, after the expiration of an initial period of time, they would be renewed "thereafter for sucessive terms of one year each, provided, however, that either party may terminate the lease at the end of the first one-year or any successive yearly term on Thirty (30) days' written notice given prior to the end of such term."

BP suffered substantial losses during the years 1970-72 and, by the fall of 1972, was re-evaluating its marketing program in the Washington, D. C. area. A tentative list of candidates for franchise non-renewal was prepared, and certain stations were identified as suitable for transition to no-frill Gas & Go stations, geared toward the provision

of gasoline and oil cheaply and quickly, with no additional services provided. BP decided that the stations operated by the plaintiffs would be converted to the Gas & Go format, and in September 1973 gave timely notice to the plaintiffs that their dealerships would not be renewed at the expiration of their terms.[1] Because of an injunction *pendente lite* issued by the district court, plaintiffs did not actually vacate the stations until February 1976.

A threshold issue is whether plaintiffs, having accepted a remittitur "under protest," may nevertheless contest the propriety of the remittitur on direct appeal, rather than having to seek such review after a new trial. This is an issue over which the circuits have divided at least three ways,[2] though, somewhat anomalously, it seems to us it has long

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[1] Between March 22, 1973 and July 17, 1973 the leases and supply agreements for nine of the ten plaintiffs came up for renewal. Plaintiff Smith's two-year lease did not expire until August 31, 1974.

Prior to BP's formal notification of non-renewal in September 1973, it had renewed the existing leases of Call Carl and Diaz for one more year, and had entered into new short-term leases embodying rental increases with Loekle, Luksenburg, Cochrane, Sherbert, DeLeonibus, and Gage. Stickell was notified in May 1973 that his lease would not be renewed when it expired on July 16, 1973. He accepted a month-to-month tenancy thereafter.

[2] Compare *Steinberg v. Indemnity Ins. Co.*, 364 F2d 266 (5th Cir. 1966) (Plaintiff who consented to entry of reduced judgment only conditionally, as a means to facilitate appeal, suffered sufficiently adverse adjudication to allow an appeal) with *Dorin v. Equitable Life Assurance Society*, 382 F2d 73 (7th Cir. 1967) (By consenting to remittitur, plaintiff waived objection to judgment entered) and *Mooney v. Henderson Portion Park Co.*, 334 F2d 7 (6th Cir. 1964) (Appealability of remittitur in diversity case treated as a matter of state law). See also Wright and Miller, *Federal Practice and Procedure*, § 2815 at 105-06. For a discussion of the policies in favor of both sides of the appealability issue, compare the majority and dissenting opinions in *Donovan v. Penn Shipping Co., Inc.*, 536 F2d 536 (2d Cir. 1976), aff'd. 45 L.W. 3556 (U. S. Feb. 22, 1977).

been settled by the Supreme Court against appealability. See *Woodworth v. Chesbrough*, 244 U.S. 79 (1917); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 52 (1895). Cf. *Lewis v. Wilson*, 151 U.S. 551 (1894). Any contention that this prohibition had grown stale with the passage of time has been put to rest by the Court this year in *Donovan v. Penn Shipping Co., Inc.*, 536 F2d 536 (2d Cir. 1976), aff'd. 45 L.W. 3556 (U.S. Feb. 22, 1977), where the preclusion of direct appeal from a remittitur, accepted with or without qualifications, was reaffirmed. In *Woodworth*, the Court of Appeals found a damage award supported by insufficient evidence, but granted plaintiff the option of filing a remittitur in lieu of a new trial. The plaintiff did so, purporting to preserve his right to challenge the remittitur in the Supreme Court in a cross proceeding. Although defendant's writ of error was decided on its merits, plaintiff's cross writ of error was dismissed by the Court, which was unwilling to permit a successful litigant to secure a conditional judgment and at the same time seek to retract the condition upon which that judgment was obtained.

We find it necessary to discuss this issue despite our reversal of the district court on the merits of the fraud and deceit count because it implicates still a larger, related, threshold question of relevance to the remaining issues before us—whether plaintiffs' attempted acceptance of the remittitur under protest, when direct appeal is not permitted, is in fact an acceptance for the purpose of rendering the district court's judgment a final, appealable order from which either side might appeal on other grounds. Once a remittitur is accepted, the reduced judgment achieves finality quite apart from whether the order of remittitur can then be appealed. But if the proper course for the district court in this case was to treat plaintiffs as having rejected the remittitur, then a new trial

should have been ordered, and none of the issues in this case would properly be before us for review, for such orders are interlocutory in nature and leave no final judgment from which to appeal. *Atlantic Coast R.R. Co. v. Sonenshine*, 226 F2d 220 (4th Cir. 1955).

Again, we look to the Supreme Court's opinion in *Woodworth* for guidance. There, the Court of Appeals apparently treated the remittitur as having been accepted although it attempted to reserve a non-existing right of review. The Supreme Court did not indicate that the Court of Appeals acted properly in this regard, and indeed the effect of the Court's holding was to leave the plaintiff with his reduced judgment, which amounts to no less than treating the conditional acceptance as unconditional. If the district court treated plaintiff's response to its order of remittitur as an unconditional acceptance in the present case, we think it was correct in doing so. See *Donovan v. Penn Shippig Co., Inc.*, 536 F2d 536 (2d Cir. 1976), aff'd. 45 U.S.L.W. 3556 (U.S. Feb. 2, 1977).

As a final threshold matter, although plaintiffs are precluded from appealing the district court's order of remittitur on their fraud and deceit count, we see no reason why they should not be able to raise before this court the propriety of the directed verdict entered against them on the Sherman Act count As we have said, the final judgment rule presents no bar, for, the acceptance being deemed unconditional, the order in fact is final, and we do not think that the reasons for prohibiting direct appeals from remittiturs require such a result with respect to entirely separate and distinct causes of action once a remittitur has been accepted on one count of a complaint. Whether phrased in terms of waiver or estoppel, the many cases prohibiting direct appeals from remittiturs base their preclusion on the idea that a plaintiff should not be able to appeal from a judgment to which he has consented

and from which he has accepted benefits.[5] But the mere acceptance of benefit in a case not involving remittitur from a judgment is not necessarily an absolute bar to appeal with respect to separate or divisible controversies. *United States v. Newton Livestock Auction Mkt., Inc.*, 336 F2d 673 (10th Cir. 1964). The acceptance of a remittitur under a complaint divided into distinct and separate causes of action, as here, would seem to be simply a specific application of this general principle, and while we are unaware of a case that has decided the precise question before us in the context of a remittitur, the case of *Kneas v. Hecht Co.*, 257 Md. 121, 262 A.2d 518 (1970), suggests a similar analysis in dicta. There, plaintiff filed a remittitur and accepted payment. The court, while recognizing the exception to the rule of waiver where the portion of the decree appealed from adjudicates a separate and distinct claim unrelated to the portion favorable to appellants, held that the exception did not apply since there was but one cause of action involved in that case.

We do not think that plaintiffs' action in accepting a remittitur to avoid a new trial on fraud and deceit damages indicates as a matter of law their assent to a directed verdict entered against them on the antitrust count of their complaint. We therefore conclude that plaintiffs are entitled to maintain this appeal on the antitrust count, but not as to the correctness of the remittitur, and we proceed to the merits.

I

Antitrust Count

The thrust of plaintiffs' Sherman Act claim is that BP, in not renewing the leases and supply contracts, engaged

[5] See *Woodworth v. Chesbrough*, 244 U.S. 79 (1917); *Kneas v. Hecht Co.*, 257 Md. 121, 262 A.2d 518 (1970); *Turner v. Washington Suburban Sanitary Commission*, 221 Md. 494, 158 A.2d 125, 130-31 (1960), and cases cited therein.

in an unlawful refusal to deal with plaintiffs in furtherance of a scheme to fix the retail price of gasoline products. In *Osborn v. Sinclair Refining Co.*, 286 F. 832 (4th Cir. 1960), we held that the cancellation of a franchise by a single oil company could constitute a refusal to deal in violation of § 1 of the Sherman Act when it occurred pursuant to an unlawful scheme of tying the sale of Goodyear tires, batteries and accessories to the sale of Sinclair gasoline. Plaintiffs in this case seek to establish the underlying illegality pervading their non-renewals by pointing to BP's desire in implementing Gas & Go to achieve control over the price of its products at the retail level.

It is apparent that the determinative issue is whether Gas & Go stations are operated directly by BP through its own employees or, as plaintiffs urge, by independent operators. If the latter, then BP could be guilty of price fixing, which is *per se* violative of § 1 of the Sherman Act. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *Osborn v. Sinclair Refining Co.*, 324 F2d 566, 573 (4th Cir. 1963). And BP's nonrenewal of plaintiffs' franchises pursuant to such a price fixing scheme could well constitute an unlawful refusal to deal. *Osborn*, 286 F2d 832 (4th Cir. 1960); see *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). If, on the other hand, Gas & Go stations are operated directly by BP, there can be no underlying price fixing conspiracy upon which to hinge a *per se* § 1 violation,[6] for BP is entitled to select

[6] With respect to the existence of a horizontal conspiracy between BP and its parent, SOHIO, the district court held that the theory of intra-enterprise conspiracy exemplified by *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), was inapplicable to this case because BP and SOHIO are not in competition in the market in which prices were allegedly being fixed, and there is horizontal competition in that market from other sources. No assignments of error are directed at the district court's analysis of this issue, and we therefore have no occasion to analyze it ourselves.

the price at which it sells its own products, and is further entitled to change its system of marketing on the retail level from independent franchises to direct company operation. See *Simpson*, p. 21; *Phillips v. Crown Central Petroleum Corp.*, 395 F.Supp. 735, 761 (D. Md. 1975).[a]

Each of the plaintiffs was offered the opportunity of becoming an "I-manager" of his converted station, as were all independent BP dealers whose stations were selected for Gas & Go. The plaintiffs, each of whom declined the offer, claim that the I-manager appellation is a mere subterfuge designed to enable BP to fix the prices of independent dealers, similar to the consignment practice condemned in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). In *Simpson*, gasoline retailers entered into one year lease and consignment agreements with the respondent oil company, pursuant to which the oil company retained title to the gasoline until sold, paid property taxes on the same, and fixed the price at which it was sold. The station operator, paid by commission, assumed all costs of station operation, and bore the risk of all losses of the gasoline in his possession, save for specified acts of God. He was also required to carry personal liability and property damage insurance with respect to the gasoline. While the Court in *Simpson* acknowledged the legality of owner price control in legitimate consignment arrangements, the company was held to have violated § 1 of the Sherman Act when it refused to renew the operator's lease solely because he sold gasoline below the fixed price.

While BP's I-manager scheme is not totally devoid of indicia of independent operation, in that the I-manager is paid by commission rather than salary, and is responsible for paying the salaries of subordinate employees and any cash shortages that may occur, the rights and responsibilities of an I-manager irrefutably place him in the category of a BP employee. In contrast to the situation in Simpson, BP pays all costs of station operation, except for the station payroll, and is responsible for accidental losses of gasoline on the station premises. BP pays all sums for Social Security, unemployment compensation and workmen's compensation with respect to the I-manager and his subordinates. Finally, an I-manager, unlike an independent operator, can be discharged like any employee on twenty-four hours notice. Had the judgment of the district court not held an I-manager to be in fact an employee, we would have been required to set it aside.

[a] *Phillips* was vacated and remanded on other grounds in No. 76-1554 (4th Cir. April 6, 1977).

We therefore think that this antitrust complaint resolves itself into nothing more than an oil company, faced with severe losses, deciding to change its operations on the retail level to assume direct operation of its own stations rather than leasing them. The fact that a desire to control retail prices contributed to this decision, far from establishing the illegality of the scheme, requires utilization of the method chosen. Any other approach could have constituted unlawful price fixing. The district court was justified in concluding as a matter of law that the essential duality of parties required for an unlawful contract, combination or conspiracy was not proven in this case.

II

Fraud and Deceit Count

At trial, plaintiffs contended that they were induced to enter into franchise agreements with BP by oral representations on the part of BP agents, known by the agents to be false, to the effect that the agreements, though of one-year duration, would be renewed annually as long as plaintiffs complied with their contractual obligations. Plaintiffs claimed that these representations, made at various times between 1971 and 1973 by three BP employees, Taggart, Southern, and Tousey, were made with deceptive intent,

and that they were relied upon by the plaintiffs, who thereby refrained from seeking more advantageous business opportunities.

The district court correctly charged the jury on the five elements of legal fraud in Maryland: (1) a representation made by a party was false; (2) its falsity was either known to the party or made with such reckless indifference to the truth to impute knowledge; (3) the misrepresentation was made for the purpose of defrauding some other person; (4) that person reasonably acted in reliance upon the misrepresentation with full belief in its truth, and he would not have done the thing from which damage resulted had it not been made; and (5) the person so acting suffered damage directly resulting from the misrepresentation. See *James v. Goldberg*, 256 Md. 520, 261 A.2d 753, 58 (1970).

As related above, the thrust of plaintiffs' complaint is that they entered into franchise renewals with BP in reliance upon fraudulent assurances that BP would not exercise its contractual right of non-renewal at the end of successive yearly lease terms, and that they were damaged by reason of having foregone other business opportunities. The jury determined that the plaintiffs sustained their burden of proof on the five elements of actionable fraud. Out of an abundance of respect for its findings,[5] we base

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[5] Nevertheless, we cannot ignore the fact that two of the ten plaintiffs, Smith and Stickell, did absolutely nothing in reliance upon any false representations made prior to their lease expiration dates in 1973. This is because Smith did not have a renewal date for his two year lease until August 31, 1974, after he received his formal notification of non-renewal, and Stickell, unlike the remaining eight plaintiffs, was not offered the opportunity to renew his lease in 1973.

While the complaint may be less than a model of clarity in defining exactly when the false statements relied upon were made, seeming to rely upon some representations made in 1971 and 1972, there is insufficient evidence from which the jury could have found

our reversal only on the fifth—the existence of damage. We think the jury was incorrectly instructed on the issue of damages, and that, in any event, the evidence of damage was insufficient to sustain the recovery.

The jury was instructed that if the defendants were found liable for either breach of contract or fraud, the measure of damages would be the same—the plaintiffs would be entitled to the "benefit of their bargain." Then, in its application of the benefit of the bargain measure of damages, the district court essentially instructed the jury to consider the future profits plaintiffs would have earned had their leases been indefinitely renewed.

In recent years, Maryland has adopted a flexible approach to damage measurement in fraud and deceit actions and, in appropriate cases, the benefit of the bargain measurement may properly be applied. *Hinkle v. Rockville Motor Co.*, 262 Md. 502, 278 A.2d 42 (1971). This is not such a case.

In *Hinkle*, plaintiff purchased an automobile, represented to be new, which in fact had been driven over 2,000 miles and had been involved in an accident. The Maryland court permitted recovery of the difference in value between the car as represented at the time of its sale and its actual value, as measured by the repairs necessary to return it to its new condition, which the court held was the benefit of the plaintiff's bargain. Among the guidelines for application of this damage measurement, the court continued, "(2) if the fraudulent representation also amounted to a warranty, recovery may be had for loss of the bargain because a fraud accompanied by a broken promise should cost the wrongdoer as much as the latter alone." 278 A.2d at 47, quoting *Selman v. Shirley*, 161 Or. 582, 609, 85 P. 2d

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that BP had knowledge of their falsity prior to the time the company started to re-evaluate its marketing practices in late 1972. See *Bell v. Speed Queen*, 407 F2d 1022 (7th Cir. 1969).

384, 394 (1938). And in *Downs v. Reighard*, 265 Md. 344, 289 A.2d 299 (1972), where negligence formed the basis for damages against a surveyor who erroneously computed acreage in preparing a subdivision plat for the plaintiff, the plaintiff was permitted to recover the value of 2.5 acres of land that he had paid for, but never received, as the benefit of his bargain.

We have found no case, however, in which the benefit of the bargain measurement has been applied to compensate a plaintiff for loss of an orally-created expectancy that is known to be directly contrary to the terms of a written agreement.[6] The plaintiffs here claim entitlement to lost future profits although each one knew that his franchise agreement was by its provisions of limited duration and expressly non-renewable by either party on thirty days' notice. Indeed, plaintiffs assert it was in response to concerns expressed by them about the short terms of their agreements that the fraudulent assurances of perpetual terms were made. In such circumstances, damages for reliance on such assurances, as indicated by plaintiffs' complaint, may have been appropriate, if proved. Rescission or reformation might also have been appropriate avenues

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[6] In somewhat similar circumstances, it has been held that proof of promissory fraud, inducing a written contract, cannot be made by representations contradictory of the terms of the integration. *Crosby v. Crescent Oil Co.*, 255 N.W. 853 (Minn. 1934). With respect to recovery of benefit of the bargain or out of pocket damages in such a case, see *General Corp. v. General Motors Corp.*, 184 F. Supp. 231 (D. Minn. 1960).

In *A. S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 165 N.Y.S.2d 475, 144 N.E.2d 371 (1957), a dealer of trucks and cranes was terminated by defendant manufacturer under a contract clause permitting either party to terminate the relationship at any time. For two years prior to the cancellation, the plaintiff dealer had been falsely told that he would never be canceled except for good cause. The New York Court of Appeals held that a cause of action for fraud had been stated, but recognized that lost future earnings was inappropriate as a measure of damages.

of pursuit. But damages for loss of an expectancy of profits created by prior or contemporaneous oral representations plainly contradictory with the terms of a written contract we believe to be non-recoverable if written contracts are to retain significance. See *General Corp. v. General Motors Corp.*, 184 F.Supp. 231 (D. Minn. 1960); *Crosby v. Crescent Oil Co.*, 255 N.W. 853 (Minn. 1934).

It is true that the parol evidence rule presents no bar to proof of fraud in a fraud and deceit action, *Standard Motor Co. v. Peltzer*, 171 Md. 678, 190 A. 239 (1947); nor in an action for rescission even where oral representations are expressly disclaimed in the contract. *Oertel v. Upper Arlington Realty Co.*, 171 Md. 678, 190 A. 239 (1937). But we do not believe that the Maryland Court of Appeals would extend this principle to permit damage awards that, by the expedient of a fraud label, would severely undermine the policy of the parol evidence rule, which is grounded in the inherent reliability of a writing as opposed to the memories of contracting parties. See *Housing Authority of College Park v. Macro Housing, Inc.*, 275 Md. 281, 340 A.2d 216 (1975). This result finds support in the case of *Cantella v. Dunn*, 264 Md. 190, 286 A.2d 122 (1972), where the court, in an action for fraud and breach of real estate covenants, noted that the relaxation of the parol evidence rule for fraud is recognized only in the pursuit of equitable remedies, such as reformation or specific performance. The plaintiff, having sued for damages, was held to have chosen his form of action at law, and was therefore subject to the constraints of the parol evidence rule. If Maryland law will not allow contract damages (as sought here) for loss of an expectancy created in *Cantella* both by oral representation and a previous writing inconsistent with the terms of a deed in an action on its covenants, we do not think it would do so in a fraud action based wholly on oral representations plainly contradictory to the terms of a contract, as appears in this case.

As an additional, though related, reason for not awarding benefit of the bargain damages in this case, we note that the guidelines set forth in *Hinkle* may well call for such a measurement only when the misrepresentation is akin to a breach of warranty, as in the sale of goods context. While we do not suggest that the rule can only apply in such a setting, we do not think that there can be a legitimate expectancy, or any cognizable bargain, when the plaintiff knows that the terms of his written agreements run contrary to that expectancy. Thus, this case is quite unlike those fraud cases in which the quality or quantity of goods is misrepresented to an unsuspecting buyer.

Finally, even applying the benefit of the bargain rule to these facts, the plaintiffs are not entitled to lost future profits, in effect contract damages. For this case differs from many fraud cases in still another respect—it contains aspects of misrepresentation of future events, not only of past or existing fact. A fraud action can only be predicated on misrepresentation of past or existing fact; breach of future promises lies in the realm of contract. *Blondes v. Hayes,* 29 Md. App. 663, 350 A.2d 163, 168 (1976); *Schwartzbeck v. Loving Chevrolet, Inc.,* 27 Md. App. 139, 339 A.2d 700 (1975). The only actionable fraud that could have been committed by BP, therefore, lies not in its failure to renew the leases, but in its misrepresentation of its existing intention to do so at the time the actionable statements were made. *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.,* 4 N.Y.2d 403, 176 N.Y.S.2d 259, 151 N.E.2d 833 (1958); *Ortel v. Upper Ashburton Realty Co.,* 171 Md. 678. 190 A. 239 (1937). Of course, the only damages that may be properly awarded are those that flow as the natural, proximate and direct effect of the fraudulent act. See *Empire Realty Co. v. Fleisher,* 269 Md. 278, 305 A.2d 144 (1973). Lost profits were proximately caused by the actual failure to renew the franchise agreements, which, as a series of future events, could not support an action for

fraud. Thus, properly applied to the facts of this case, the benefit of the bargain rule might well entitle plaintiffs to the difference in value between a short-term lease which the lessor presently intends to renew (i.e. as though the fraudulent representation had been true), and one which the lessor intends to terminate. Even in the former case, the intention could not be considered irrevocable, and the truth of its expression at one moment could give way to a legitimate change of mind in the next. We must therefore conclude that the difference in value must be negligible, for it was not proved, and there is no damage under the benefit of the bargain formulation proximately caused by defendants' fraud.

Ordinarily, when an erroneous damage charge is given, we should remand to the district court for a new trial on the issue of damages. Such a remand would not serve a useful purpose in this case, however, because plaintiffs either have not, or could not, introduce sufficient evidence of damage to justify an award on any permissible theory. They have failed to prove damage resulting from lost business opportunities, although alleged in the complaint. The jury was not instructed with respect to such damages, and plaintiffs did not object to the omission. The jury was instructed on other reliance damages—loss from investment in inventory, stock and equipment—but clearly no such damage could have occurred here as a result of BP's fraud. This is because, while plaintiffs may have made such investments as a result of 1973 lease renewals, they also operated their stations during those lease terms, as well as during the next two years because of the district court's injunction, and no evidence appears that any such initial investment lingered on until the dissolution of the injunction. Undoubtedly any investment made in reliance on BP's fraud in 1973 has long since been recouped by plaintiffs in normal operating, and sales, and profits, else evidence would have been offered to establish it.

As an alternate basis for the result we reach here, we do not think the plaintiffs could reasonably have relied upon the allegedly fraudulent statements made in the face of plainly contradictory contractual language. In *James v. Goldberg*, supra, the Maryland court upheld a directed verdict against a plaintiff in a fraud and deceit action, holding that he had no right to rely upon allegedly false oral statements that were clearly belied by the language of the written agreement between the parties. Just as strong is the opinion of this court in *Holt v. Quaker Oil Refining Co.*, 67 F2d 170 (4th Cir. 1933), in which, on facts practically identical to the case at hand, we approved the district court's exclusion of evidence of false oral promises of indefinite distributorship renewal, when the written contract between the parties called for a one-year, renewable, business relationship. A directed verdict for the defendant was again upheld.

We find *James*, and perhaps *Holt*, quite persuasive, if not actually controlling, and denominate those cases an alternate ground only because it is difficult for us to say with assurance, in view of the seemingly endless number of fraud causes in Maryland that arise out of contractual dealings, that circumstances cannot exist in which the rule may be relaxed for limited purposes.

The judgment of the district court is accordingly affirmed as to the antitrust count and reversed as to the fraud count.

AFFIRMED IN PART;
REVERSED IN PART.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION No. 73-1059-Y

CALL CARL, INC., ET AL, *Plaintiffs*

vs.

BP OIL CORPORATION AND THE STANDARD OIL COMPANY (OHIO), *Defendants*

Final Judgment

The jury having returned its verdict in favor of plaintiffs on Count IV of the Complaint; the Court having considered defendant's Motion for Judgment N.O.V. or New Trial, and having, *inter alia*, denied the New Trial motion with respect to damages conditioned upon the plaintiffs' remittitur of sums in excess of the amounts set forth in the Memorandum and Order of October 22, 1975; the plaintiffs having filed a Remittitur of such sums under protest in order to preserve their rights on appeal, and the Court acknowledges receipt of the said Remittitur under protest; and it appearing to the Court that the entry of a final judgment is appropriate in order to resolve certain procedural issues, it is this 14th day of January, 1976, hereby ORDERED, ADJUDGED and DECREED, as follows:

1. The Order for preliminary injunction and bond thereon hereinbefore entered is hereby set aside and the preliminary injunction issued pursuant to said Order is hereby dissolved.

2. The requirement for a preliminary injunction bond is removed and the Fidelity & Deposit Company of Maryland is hereby relieved and released of any and all obligations arising under bond number 594 58 53, filed heretofore in this case.

3. Plaintiffs' requests for permanent injunctive relief are hereby denied and plaintiffs are required to surrender possession of the BP station properties presently occupied by them to BP Oil, Inc., on or before thirty (30) days from the date hereof.

4. Each plaintiff is hereby awarded damages under Count IV of the Complaint in the amounts set forth after the name of each in the Memorandum and Order dated October 22, 1975.

5. For the purpose of computing time for any appeal or cross appeal, this shall constitute the final judgment with respect to all issues in this case, including all matters decided in the Memorandum and Order of October 22, 1975.

/s/
United States District Judge

(Caption Omitted in Printing)

Amended Judgment

The above entitled case came before the Court and a Jury, the Honorable Joseph H. Young, United States District Judge, presiding, for the purpose of trial on April 21, 1975, Count No. 2 of the Amended Complaint having been dismissed by stipulation of the parties in the Pretrial Order signed by Judge Young on April 21, 1975; on April 29, 1975, an oral Motion was made by defendants for a Directed Verdict at the Conclusion of the plaintiffs' case in chief, and after hearing argument of counsel for the respective parties, said Motion was granted by the Court as to Count No. 1 of the Amended Complaint; on May 2, 1975, at the Conclusion of all the Evidence, argument of counsel for the respective parties and the Court's

Charge to the Jury, the case was submitted to the Jury for their consideration as to Counts Nos. 3, 4 and 5 of the Amended Complaint, and after deliberating, the Jury returned a Verdict; therefore, it is this 5th day of May, 1975, by the United States District Court for the District of Maryland

Ordered and Adjudged:

1. That Judgment be, and the same is, hereby entered in favor of Plaintiff Call Carl, Inc. against Defendants as to Count No. 4 of the Amended Complaint in the amount of Sixty-Six thousand Dollars ($66,000.00), and Costs.

2. That Judgment be, and the same is, hereby entered in favor of Plaintiffs Francisco Diaz and Avelino Pestana against Defendants as to Count No. 4 of the Amended Complaint in the amount of Seventy Thousand Dollars ($70,000.00), and Costs.

3. That Judgment be, and the same is, hereby entered in favor of Plaintiff Remo Gage against Defendants as to Count No. 4 of the Amended Complaint in the amount of Fifty Thousand Dollars ($50,000.00), and Costs.

4. That Judgment be, and the same is, hereby entered in favor of Plaintiff Hoyt M. Smith against Defendants as to Count No. 4 of the Amended Complaint in the amount of One Hundred and Fifty-Seven Thousand Dollars ($157,000.00), and Costs.

5. That Judgment be, and the same is, hereby entered in favor of Plaintiff Robert J. Cochrane, Sr. against Defendants as to Count No. 4 of the Amended Complaint in the amount of One Hundred and Ten Thousand Dollars ($110,000.00), and Costs.

6. That Judgment be, and the same is, hereby entered in favor of Plaintiff R. Wayne Loekle against Defendants as to Count No. 4 of the Amended Complaint in the

amount of One Hundred and Five Thousand Dollars ($105,000.00), and Costs.

7. That Judgment be, and the same is, hereby entered in favor of Plaintiff William Luksenburg against Defendants as to Count No. 4 of the Amended Complaint in the amount of Two Hundred and Seventy Thousand Dollars ($270,00.00), and Costs.

8. That Judgment be, and the same is, hereby entered in favor of Plaintiffs Angelo DeLeonibus and Sabatino DeLeonibus against Defendants as to Count No. 4 of the Amended Complaint in the amount of Two Hundred and Seventy Thousand Dollars ($270,000.00), and Costs.

9. That Judgment be, and the same is, hereby entered in favor of Plaintiff Richard L. Stickell against Defendants as to Count No. 4 of the Amended Complaint in the amount of One Hundred and Ten Thousand Dollars ($110,000.00), and Costs.

10. That Judgment be, and the same is, hereby entered in favor of Plaintiff Melvin Sherbert against Defendants as to Count No. 4 of the Amended Complaint in the amount of Fifty-Seven Thousand Dollars ($57,000.00), and Costs.

11. That Judgment be, and the same is, hereby entered in favor of Defendants against all Plaintiffs as to Count Nos. 1, 3 and 5 of the Amended Complaint.

12. That Count No. 2 of the Amended Complaint be, and the same is, hereby **DISMISSED**.

/s/ Sig Illegible
United States District Judge.

DATED: May 5, 1975

Verdict and Judgment Paragraph	*Plaintiff*	*Amount of Judgment Entered*		*Plaintiffs' Expert Evidence*	
1	Call Carl, Inc.	$ 66,000.00	Pltf's Ex. 115	3 Yrs. Earnings	$ 50,610.00
				Stock & Equipment	15,983.00
					$ 66,593.00
2	Francisco Diaz and Avelino Pestana	$ 70,000.00	Pltf's Ex. 116	9 Yrs. Earnings	$ 60,019.00
				Stock & Equipment	5,819.00
					$ 65,838.00
3	Remo Gage	$ 50,000.00	Pltf's Ex. 117	Adj. to '74 Earnings	$ 7,140.00
				7 Yrs. Lost Earnings from loss of brand	41,150.00
					$ 48,290.00
4	Hoyt M. Smith	$157,000.00	Pltf's Ex. 108	3 Yrs. Earnings	$148,561.00
				Stock & Equipment	7,627.00
					$156,188.00
5	Robert Cochrane, Sr.	$110,000.00	Pltf's Ex. 111	5 Yrs. Earnings	$102,843.00
				Stock & Equipment	8,479.00
					$111,322.00

Verdict and Judgment Paragraph	Plaintiff	Amount of Judgment Entered		Plaintiffs' Expert Evidence	
6	R. Wayne Loekle	$105,000.00	Pltf's Ex. 112	3 Yrs. Earnings Stock & Equipment	$ 83,796.00 32,402.00 $116,198.00
7	William Luksenburg	$270,000.00	Pltf's Ex. 109	9 Yrs. Earnings Stock & Equipment	$253,038.00 19,698.00 $272,736.00
8	Angelo and Sabatino DeLeonibus	$270,000.00	Pltf's Ex. 114	5 Yrs. Earnings Stock & Equipment	$245,363.00 26,050.00 $271,413.00
9	Richard L. Stickell	$110,000.00	Pltf's Ex. 110	5 Yrs. Earnings Stock & Equipment	$100,288.00 10,066.00 $110,354.00
10	Melvin D. Sherbert	$ 57,000.00	Pltf's Ex. 113	5 Yrs. Earnings Stock & Equipment	$ 50,225.00 6,969.00 $ 57,194.00
	Totals	$1,265,000.00			$1,276,126.00

(Certificate of Service Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

Filed:

Jerry S. Cohen, Esq., Herbert E. Milstein, Esq., and Michael D. Hansfeld, Esq., Washington, D.C., and William Sammons, Esq., and Morris Rosenberg, Esq., Baltimore, Maryland, for Plaintiffs.

Benjamin R. Civiletti, Esq., John Henry Lewin, Sr., Esq., and John Henry Lewin, Jr., Esq., Baltimore, Maryland, for Defendants.

Young, *District Judge*.

The plaintiffs in this action are individuals and corporations acting as independent service station operators under one-year franchise agreements with BP Oil Corporation [BP]. The defendants are Standard Oil of Ohio [SOHIO], a major marketer and refiner of gasoline, and its wholly owned subsidiary, BP.

The case went to trial on all issues, and on May 2, 1975, the jury returned a verdict in favor of all plaintiffs and against both defendants in the total amount of $1,265,000 under Count IV of the complaint.

At trial, the defendants moved for a directed verdict on all counts at the end of all evidence, and the Court granted the motion as to Count I. The reasons supporting the directed verdict on Count I are elaborated more fully below.

Defendants have now moved for a Judgment Notwithstanding the Verdict under Fed. R. Civ. P. 50 or in the alternative for a new trial on all issues of Count IV un-

der Fed. R. Civ. P. 59. As hereinafter discussed, the verdict will be set aside and a new trial ordered on the issue of damages unless within fifteen days the plaintiffs file a remittitur as set forth below.

FACTS

For the purpose of clarity, the facts of the case should be set forth briefly. SOHIO purchased BP for a marketing arm on the East Coast at a time when BP was operating at a loss. SOHIO and BP then launched a long-term marketing study which analyzed the principal East Coast markets in which BP owned stations. Lee Hickerson, a SOHIO employee, was transferred to BP as the manager of the market development plan, and took charge of the study. A report on the Washington, D.C. market was presented to BP and SOHIO in November, 1970, and a report on the Baltimore market was presented in March, 1971, followed by reports on other markets, each recommending that BP acquire additional sites and expand its conventional business.

The Hickerson group then presented a new market study of the Philadelphia market which recommended that BP radically alter its conventional marketing approach there in order to offset losses and gain in market share. The report suggested that BP divest itself of its unprofitable stations, institute station/car wash services, and transform 20 of the high volume stations into company owned and operated high-volume/cut-rate "gas and go" stations. The Philadelphia recommendation was put into effect in 1972, and the plan met with instant success.

Total volume sales did not increase in the Baltimore-Washington area, however, and in late 1972, the Hickerson group re-examined the market situation there and determined that its prior recommendation that BP remain a conventional marketer was incorrect, suggesting instead

that the Philadelphia plan might work as an alternative marketing approach in the Baltimore-Washington area.

As a result, on May 9, 1973, Hickerson produced the "BP Northeast Project Report and Recommendation." This report, in substance, recommended that BP adopt the same plan which had operated in Philadelphia in the Baltimore-Washington market. Pursuant to the study, BP ceased operating as a conventional dealer in the Baltimore-Washington market, and proceeded as follows:

1. BP and SOHIO sold one of BP's refineries, its trunk lines in Texas, and properties in Florida, Georgia and the Carolinas;

2. Presently operating high-volume stations and other potential high-volume sites were converted to gas and go stations;

3. Marginal stations were closed and others were operated under the William Penn logo owned by SOHIO; and

4. By letter of September 26, 1973, Charles King, Vice-President of BP, wrote to each of the plaintiffs and other BP dealers, advising them of the new marketing procedures, and cancelling each of their franchise agreements at the end of its term. Each cancellation was timely under the terms of the corresponding contract. BP also presented each of the dealers certain alternatives:

1. becoming BP employees as "1-Managers" of gas and go stations;

2. becoming William Penn dealers; or

3. leaving BP.

Each of the plaintiffs signed a new contract sometime between April and July of 1973. They claim that they were induced to enter into these agreements by the continuing promise that if they did not violate any provisions of the agreements, they could "operate their stations forever."

Under Count IV, plaintiffs allege that the defendants' representations were fraudulent insofar as the plaintiffs were induced to enter into franchise agreements by the promise of continuing contracts when the defendants never intended to stand by these promises.

DIRECTED VERDICT ON COUNT I

Count I incorporates two theories of recovery, both based in antitrust law. The first theory is that BP and SOHIO conspired, combined or contracted with dealers vertically to refuse to deal with the plaintiffs in furtherance of a marketing scheme by which BP would fix the price of gasoline at gas and go stations. The second theory of recovery under Count I is that BP and SOHIO conspired horizontally with each other and with other major marketers of gasoline to alter BP's share of the market and to fix prices at gas and go stations. Both forms of conspiracy allegedly constituted unreasonable restraints of trade in violation of Section One of the Sherman Act, 15 U.S.C. § 1 (1970).

The antitrust count fails in two respects. First, the plaintiffs failed to prove that a conspiracy existed, either horizontally or vertically. Second, even if a conspirnacy had existed, plaintiffs failed to show that the outcome of the conspiracy had any anticompetitive effect constituting a restraint of trade in violation of the Sherman Act.

HORIZONTAL CONSPIRACY

The plaintiffs have failed to show even a scintilla of proof that either SOHIO or BP made any agreement on any matter with any other oil marketer. A more difficult problem arises because certain agreements were shown between BP and SOHIO.

The weight of authority is to the effect that affiliated corporations within a single commonly-owned enterprise

are separate entities capable of conspiring with each other in violation of the Sherman Act. This is called the "bathtub" or "intra-enterprise" theory of conspiracy. There seems to be general, although not enunciated support for this proposition in Supreme Court cases.

In *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), a company was formed which acquired complete or controlling interests in major taxicab companies and which therefore dominated the ownership of taxi licenses in many major cities. The companies then agreed to control the operation and purchase of cabs in those cities. The affiliated companies argued that they operated within a neutrally integrated enterprise which would prevent any agreement between them from being a conspiracy. The Court disagreed, stating:

> . . . [An] unreasonable restraint on interstate commerce . . . may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. . . . The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act.

332 U.S. at 227.

In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), the Supreme Court held that since a parent and subsidiary had availed themselves of the privilege of doing business as separate corporations, the fact of common ownership could not save them from any of the obligations imposed by the law on separate entities. *Id.* at 141-42, *citing Timken Co. v. United States*, 341 U.S. 593, 598 (1951).[1]

[1] *See also* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc. 340 U.S. 211 (1951); Schine Chain Theatres, Inc. v. United States. 334 U.S. 110 (1948).

Nevertheless, there is certain persuasive authority which holds that a parent and subsidiary cannot conspire in violation of Section One of the Sherman Act *if they are not in actual competition in the market. See Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094 n.1 (3d Cir. 1972); *United States v. Arkansas Fuel Oil Corp.*, 1960 Trade Cas. ¶ 69,619 (N.D. Okla. 1960); *contra, TV Signal Co. v. Am. Tel. & Tel. Co.*, 462 F.2d 1256, 1260 (8th Cir. 1972); *Tamaron Distrib. Corp. v. Weiner*, 418 F.2d 137, 139 (7th Cir 1969).

Common sense dictates the conclusion that where conspirators are *not* competitors in the market in which prices are allegedly being fixed, *and* there is horizontal competition in that market, then no harm can be done, and therefore no restraint of trade can be accomplished by, an agreement to refuse to deal or to fix prices.[2]

Plaintiffs, with the burden of proving the existence of a conspiracy, failed to show that BP and SOHIO are in competition in the market, *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753, 759 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965), and a directed verdict on the horizontal aspect of the antitrust count was granted.

[2] At least one authority, Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 35 (1968) argues that to allow affiliated corporations not in competition with each other to constitute a conspiracy would discourage corporations from decentralizing corporate management, which they would normally do for reasons which have nothing to do with market considerations. The article suggests that the intra corporate conspiracy theory be utilized only when the parent and subsidiary publicly adopt a competitive posture à la *Kiefer-Stewart*, or the parent does business through subsidiaries and uses the subsidiaries to produce anticompetitive effects à la *Yellow Cab. Id.* at 35. Neither of these conditions is present in this case.

Vertical Conspiracy

Plaintiff also failed to prove the existence of a vertical conspiracy. BP and SOHIO did not enter into any agreements with independent dealers to fix prices or to refuse to deal with the plaintiffs. Nor were the plaintiffs forced to become unwilling participants in a scheme which violated the antitrust laws. *See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht v. The Herald Co.*, 390 U.S. 145, 150 n.6; *Simpson v. Union Oil Co.*, 377 U.S. 13, 17 (1964); *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960); *Phillips v. Crown Central Petroleum Corp.*, Civil No. 73-303-H, at 48-56 (D. Md. May 20, 1975).

BP cannot be said to have conspired with those dealers who became I-Managers, for a corporation cannot conspire with itself or with its own employees, *Goldinger v. Boron Oil Co.*, 375 F. Supp. 400, 406 (W.D. Pa. 1974).[3]

Since plaintiffs have failed to show that a conspiracy existed, an essential element of the cause of action under Section One of the Sherman Act is missing and a verdict should be directed on Count I of the complaint.

Even assuming that a conspiracy could be shown, however, the plaintiffs did not tender evidence establishing a violation of the antitrust laws.

The substance of the complaint under Count I is that BP and SOHIO engaged in a concerted refusal to deal with the plaintiffs and other dealers in furtherance of a price fixing scheme. The plaintiffs cite *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) and *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1960) in support of the illegality of this refusal to deal.

[3] On whether I-Managers were employees of BP or independent dealers, *see* the discussion of Simpson v. Union Oil Co., 377 U.S. (1964), *infra*.

Osborn merely establishes the fact that although a concerted refusal to deal, without any more, is legal, *United States v. Colgate,* 250 U.S. 300 (1919), if a refusal to deal is in furtherance of a scheme such as price fixing which is in violation of the antitrust laws, the refusal to deal is also in violation of the antitrust laws, *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960).

A violation of the antitrust laws could therefore exist if there were a price fixing arrangement, or, if, absent price fixing, there were a refusal to deal which was otherwise in violation of the antitrust laws.

Price Fixing

It has long been held that conspiracies to fix prices are illegal *per se* as unreasonable restraints of trade under Section One of the Sherman Act, whether the conspiracy be horizontal, *United States v. Socony-Vacuum Oil Co., Inc.,* 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.,* 273 U.S. 392 (1927), or vertical, *Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons, Inc.,* 340 U.S. 211 (1951) (maximum price set); *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911) (maximum price set).

Before moving on to the refusal to deal, therefore, it must be determined whether the system of distribution which presently exists, that is, sale through I-Manager stations, constitutes a scheme to fix prices in light of *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964). In *Simpson,* Union Oil had a consignment agreement with its dealers. The agreement was for a one-year term, at which time either party could terminate the relationship. The agreement was issued in conjunction with a lease of the station property. Prices were set by Union. Title to the gas remained in the company until sold by the dealer, and the company paid taxes on all gasoline. The dealer was required to carry personal liability insurance and property damage insurance and held the risk of loss on goods. The dealer, paid by a minimum commission, paid all costs of operation. The Supreme Court held that price fixing by Union Oil had an anti-competitive effect and was hidden by the consignment agreement in which each dealer was actually an independent businessperson who carried the risks of the station business.[4]

Although there was a good deal of argument on the subject by counsel in this case, plaintiffs introduced no evidence by testimony or exhibits to prove that the I-Manager relationship was not one of employer/employee. To the contrary, the only evidence on the part of the plaintiffs tended to show that the individual plaintiffs did not want to become I-Managers because they felt that they would have to sacrifice their status as independent business-persons to become employees of BP who had little or no say in the running of the stations.

Price fixing was not shown for the same reason that a conspiracy was not shown; plaintiffs failed to prove that there were two separate and independent parties capable of conspiring with each other in order to fix prices. A company may, of course, own and operate its own stations, and may set its own retail prices without violating the antitrust laws. *See Phillips v. Crown Central Petroleum,* Civil No. 73-303-H, at 50 (D. Md. May 20, 1975).

The Refusal To Deal

Assuming that there was no agreement to fix prices, it remains to be determined whether the defendants' refusal to deal with the plaintiffs violated the antitrust laws. This

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[4] *Simpson* narrowed the case of United States v. General Electric Co., 272 U.S. 476 (1926), to its facts. There a simple agency agreement existed between a salesperson and the company and the fixing of the retail prices was held lawful.

case is clearly parallel to *Knutson v. The Daily Review, Inc.*, 383 F. Supp. 1346 (N.D. Cal. 1974).

In *Knutson*, the plaintiffs were independent dealers who purchased, distributed and resold daily newspapers. The fendants were newspaper publishers. Originally, the plaintiffs acted as independent dealers who bought the papers outright from the publishers and thereafter took the risks of distribution and sale of the papers. The defendants attempted to set subscription prices which the independents could charge, and the dealers acquiesced in charging the prices suggested by the publishers. When the plaintiff dealers complained that the price fixing and certain territorial restraints were anticompetitive and therefore illegal, the defendants terminated their contracts with the plaintiffs in order to institute their own in-house distributing scheme. Each plaintiff was offered a job as a salaried district manager. The plaintiffs refused these positions and contested the change in the distributional scheme under the antitrust laws.

The court held that there had been price fixing under the independent dealership arrangement, but that the defendants were warranted in terminating the independent distributors. First, the court held that since the change in market procedure had been made by one man who controlled all of the defendant companies, there could be no contract combination or conspiracy. *Id.* at 1358-59. Nevertheless, the court went on to hold that even if there had been a conspiracy, the decision to change the papers' scheme of distribution was the product of good economic sense and a desire to operate within the antitrust laws. The court stated that:

> . . . a manufacturer does not violate the antitrust laws simply by discontinuing his dealings with a particular distributor. . . . Nor is a manufacturer forever bound to use the same system of distribution when sound business considerations suggest that a different method be used. Thus, a manufacturer can lawfully terminate an independent distributor and thereafter sell exclusively through its own outlets. *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972).

383 F. Supp. 1360-61.

The court recognized the interest of the publishers in having a uniform subscription price since it facilitated promotion of the paper and avoided subscriber hostility:

> The Court finds credible [the publisher's] testimony that his decision was made to ensure that his businesses were in full compliance with the law and to maintain simultaneously the greatest degree of influence which the law would allow over all aspects of the circulation of the newspapers, including not only influence over the subscription price but also over the frequency of publication, method of payment [and] type of distribution. . . . [The publisher] desired influence in these areas in order to meet the competition [and to] preserve the financial integrity of the newspapers.

Id. at 1364.

In spite of the sense of the publisher's decision, the existence of sound business reasons alone was not sufficient to satisfy the court that no unlawful restraint had occurred; a mere refusal to deal which was the product of sound business sense would only be lawful as long as no substantial anticompetitive effect or unreasonable restraint of trade was a result. *Id.* at 1365, *citing United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967). Determining whether such results occurred or were intended requires a "consideration of the facts peculiar to the business in which the restraint is applied, the nature of

the restraint and its effects, and the history of the restraint and the reasons for its adoption." *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 607 (1972). The court held, however, that the plaintiffs in *Knutson* had not proved anticompetitive impact or effect on the market place, especially considering the "generous offer of employment which accompanied the termination notice and the speculative value of [the] businesses. . . ." 383 F. Supp. at 1365. The court held also that the plaintiffs failed to prove that the scheme enhanced an already dominant market position because they had failed to identify the relevant product and geographic markets. *Id.* at 1366, *citing United States v. Grinnell Corp.*, 384 U.S. 563, 571-76 (1966), and *United States v. duPont & Co.*, 351 U.S. 377, 393-400 (1956) (Section 2 relevant market cases).

The logic of *Knutson* is irrefutable regarding the lawfulness of termination of independent dealers in an effort to change a scheme of distribution which in turn is a response to economic and legal realities. *See also, Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969); *cert. denied*, 396 U.S. 1072 (1970); *Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972).

The case at hand is strikingly parallel to *Knutson*. BP could not fix prices at its independent stations and it faced severe economic losses should it continue its present distributing scheme. It therefore chose to adopt a system whereby it could regulate method of distribution and price lawfully in an effort to operate at a profit. "Gas and go" was the result. It was a distributional scheme which was the product both of good economic sense and a desire not to run afoul of the antitrust laws.

The plaintiff failed entirely in its burden of proving anticompetitive effect. There was no testimony tending to

show the relevant geographic market, BP's position in that market, or the effect of the change in distribution of a relevant product on that market. Nor was there a showing that "gas and go" hampered competition; in fact "gas and go" conformed BP's marketing stance to the high-volume/low-price position already adopted by other competitors. The result was, if anything, beneficial to the consumer in the form of lower prices.

Even taking all evidence in the light most favorable to the plaintiffs, as the Court is required to do on a motion for directed verdict, the Court concludes that there are no controverted issues of fact upon which reasonable people could differ, *Pogue v. Retail Credit Co.*, 453 F.2d 336, 338 (4th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973), and that a verdict should be directed in favor of the defendants on Count I of the complaint.

Judgment Notwithstanding the Verdict

The standard for granting a judgment notwithstanding a verdict under Fed. R. Civil P. 50 is the same as the standard for granting a motion for a directed verdict. *Hawkins v. Sims*, 137 F.2d 66, 67 (4th Cir. 1943). The test for denying a directed verdict motion, in turn, is, viewing the evidence in the light most favorable to the party against whom the motion is made, and giving that party the benefit of all reasonable inferences which arise from the evidence, where there is evidence upon which a jury could reasonably find a verdict for that party. *Ralston Purina Co. v. Edmunds*, 241 F.2d 164, 167 (4th Cir.), *cert. denied*, 353 U.S. 974 (1957).

Reviewing the evidence and the inferences drawn therefrom in the light most favorable to the plaintiffs, it is clear that there was enough evidence in the plaintiffs' favor to submit the case to the jury and to prevent a directed verdict in the defendants' favor.

Defendants have moved for a judgment notwithstanding the jury's verdict on Count IV on two grounds. Defendants claim first that there was insufficient evidence on which the jury could have found that the plaintiffs had a right reasonably to rely on Taggart, BP's sale's representative, in light of the integration clause in the contract which allegedly put the plaintiffs on notice that they could not rely on oral representations outside the contract.

To the contrary, there was sufficient evidence for the jury to find not only that Taggart had actual authority to make these representations, but that the representaions were fraudulent, thus vitiating the contract and its integration clause.

Taggart, who negotiated lease agreements with the plaintiffs, testified that at the training school for BP sales representatives, he and other dealers were told by one Jackson that dealers would probably object to short-term leases. To meet these objections, Jackson said, sales repreentatives should tell prospective dealers that if they conformed to the conditions of their leases, they could stay on "forever" at their stations. Taggart also stated that he told his District Manager Mark Baltes, of these representations. Jerry Southern, another sales representative who dealt with some of the plaintiffs, stated that Taggart and the other sales representatives were told that they had a free hand in negotiations with dealers. There was therefore sufficient evidence that the BP representatives were given authority to make such representations.

There was also evidence that the plaintiffs could and did rely on the assurances, although some of the plaintiffs had other reasons for becoming BP dealers. Nevertheless, a fraudulent representation may be one of several reasons for action, and need not be the sole cause as long as there is some reliance on the misrepresentation. *Savings Bank Retirement Sys. v. Clarke*, 258 Md. 501, 507, 265 A.2d

921, 924 (1970). Since fraud renders a contract void, proof of actionable fraud as defined by the case law, *see, e.g., Appel v. Hupfield*, 198 Md. 374, 84 A.2d 94 (1951), would render the contract, and therefore the integration clause, irrelevant. BP's course of dealing over the years, the lack of education on the part of some of the plaintiffs, the language barrier in some cases, the perfunctory manner in which the contracts were handled, and the difference in bargaining power between the plaintiffs and the defendants all support the inference that the assertions made by Taggart to the plaintiffs constitute fraudulent misrepresentations on which the plaintiffs had a right to rely. *See BP Oil Corp. v. Guise*, No. 73-4417 (Ct. Com. Pl. Mont. Co. Pa. 1974).

Defendants' second ground for judgment n.o.v. is that the evidence did not show that the plaintiffs' reliance on the defendants' fraudulent statements was a proximate cause of their injury. As plaintiffs correctly indicate in their memorandum in opposition to the motion for judgment n.o.v., defendants mistake the nature of damages recoverable in a case where fraud is shown. Plaintiffs relied on fraudulent misrepresentations that their contracts would be perpetually renewed as long as they performed their side of the franchise contract. Once that contract was voided by fraud, the party injured was deprived of the benefit of the contract into which he supposedly entered. In this case, the plaintiffs are being deprived of their franchise stations and are entitled to the "benefit of the bargain" which they made, or the future earnings which they could reasonably have made had BP performed its end of the contract. See *Hinkle v. Rockville Motor Co., Inc.*, 262 Md. 502, 511-13, 278 A.2d 42, 47 (1971). *See also Downs v. Reighard*, 265 Md. 344, 289 A.2d 299 (1971).

The loss of anticipated earnings was therefore proximately caused by the fraudulent misrepresentation. The

extent of this loss is not speculative, for there was a lengthy prior relationship between the plaintiffs and the defendants on which an appropriate measure of damages could be based.

New Trial

On a motion for a new trial under Fed. R. Civ. P. 59, a verdict may be set aside and a new trial granted when a new trial would be in the interest of justice, *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941). The burden of showing error at trial warranting a new trial rests on the party seeking a rehearing of the merits. 11 C. Wright and A. Miller, Federal Practice and Procedure, Civil § 2083, at 32 (1973).

The claim that the jury's verdict was against the weight of the evidence was dealt with above, and needs no additional elaboration. The verdict will stand on the issue of liability.

On the question of damages, however, a new trial is warranted. The Court is satisfied that the issues of liability and damage are not so inextricably interwoven that a partial new trial on the issue of damages alone could not be had. *See Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494 (1931); *Young v. International Paper Co.*, 322 F.2d 820 (4th Cir. 1963); *Mason v. Mathiasen Tanker Ind., Inc.*, 298 F.2d 28, 32-33 (4th Cir.), *cert. denied*, 371 U.S. 828 (1962); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 511 F.2d 839 (4th Cir. 1975); C. Wright and A. Miller, Federal Practice and Procedure, Civil § 2814, at 93 (1973).

Although a court is not free to set aside a verdict simply because the court would have awarded a different amount of damages than the jury, it is the duty of the trial court to grant a new trial when confronted with an excessive verdict, *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350 (4th Cir. 1941); *Casale v. Dooner Lab., Inc.*, 343 F. Supp. 917, 918 (D. Md. 1972), *aff'd in part, reversed in part on other grounds*, 503 F.2d 303 (4th Cir. 1973), or when the verdict shocks the conscience of the court, *Casale v. Dooner Lab., Inc.*, 343 F.Supp. 917, 919 (D. Md. 1972).

As stated by the late Chief Judge Parker:

> "The power and the duty of the trial judge to set aside the verdict . . . is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. . . .
>
> "To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require."

Virginia Railway Company v. Armentrout, 166 F.2d 400, 408 (4th Cir. 1948).

But a new trial is not the only relief available to a party who suffers under an excessive verdict. The principle of remittitur is ancillary to the right of the trial judge to grant a new trial under such circumstances. Although the Court may not deprive the right of the parties to a jury trial under the Seventh Amendment, a remittitur may be assessed in an amount that will bring the verdict on damages to the maximum amount which the jury could have awarded under the evidence introduced at trial. 11 C. Wright and A. Miller, Federal Practice and Procedure, Civil § 2815, at 104-05 (1973), thus affording the plaintiffs an opportunity to make a remittitur or to

accept a new trial if the plaintiffs do not consent to a remittitur.

The Court is satisfied that the awards of damages are grossly excessive and shocking to the conscience. A careful review of the evidence on damages shows it to be too vague and speculative to warrant damages in the excessive amounts awarded by the jury. The expert called by the plaintiffs projected damages for periods of three to nine years, rejecting the views expressed by the plaintiffs themselves that, under prior—but similar—leases, they could "get out" of the lease at its termination by giving a short notice. The testimony shows the transitory nature of gasoline station leases, and a projection of a lease of periods up to nine years is out of touch with reality. Nor is there any basis in fact for the testimony of the plaintiffs' expert relating to an adjustment for 1974 earnings.

The plaintiffs are entitled to payment for investment in stock and equipment and for earnings for two years—the maximum reasonable amount which could have been awarded by the jury.

Accordingly, it is this 22nd day of October, 1975, by the United States District Court for the District of Maryland, ORDERED:

1. That the defendants' motion for a directed verdict on Count I of the complaint be, and the same is, hereby granted;

2. That the defendants' motion for a judgment notwithstanding the verdict be, and the same is, hereby denied;

3. That the defendants' motion for a new trial on the issue of liability on Count IV of the complaint be, and the same is, hereby denied; and

4. That the verdict of the jury on the issue of damages only in favor of the plaintiffs herein and the judgment

entered thereon on May 5, 1975, be set aside and a new trial awarded on the issue of damages only, unless within fifteen (15) days of the date of this Order the plaintiffs file a remittitur of all sums in excess of the amounts set forth after the name of the plaintiffs listed hereunder:

Carl Carl, Inc.	$ 47,497.00
Francisco Diaz & Avelino Pestana t/a Piney Branch BP Service Station	21,799.00
Remo Gage t/a Gage's Service Center	11,757.00
Hoyt M. Smith t/a Smitty's BP	99,653.00
Robert Cochrane, Sr., t/a Cochrane's Shady Grove BP	50,550.00
R. Wayne Loekle t/a Manor BP	83,927.00
William Luksenburg t/a Twinbrook BP	85,432.00
Robert DeLeonibus D & D Service	125,246.00
Richard L. Stickell t/a Dick's BP	50,949.00
Melvin D. Sherbert t/a Queenstown BP	27,022.00

/s/ Sig Illegible.... .. ..
United States District Judge.

In The

Supreme Court of the United States

October Term, 1977

No. 77-356

CALL CARL, INC., et al.,
Petitioners,

v.

BP OIL CORPORATION and
THE STANDARD OIL COMPANY (OHIO),
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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had pendant jurisdiction when, under applicable state law, there was insufficient evidence of two essential elements of the claim?

3. Was not the Court of Appeals correct in deciding that a party cannot assail on appeal a remittitur which it has accepted?

STATEMENT OF THE CASE

From its incorporation in 1969 until 1973, BP Oil Corporation ("BP"), marketed gasoline and lubricants in the conventional way. BP sold its products outright to independent dealers under written contracts expressly terminable at their expiration dates upon thirty days prior notice, who, in turn, resold them to the motoring public at service stations which they leased from BP by similarly terminable written leases. Most dealers offered normal automotive services as well.

Petitioners were ten independent dealers who, at various times prior to 1973 in the Washington, D.C. area, leased BP stations and purchased BP products for resale under these written leases and supply contracts. The fully integrated agreements were expressly self-renewing for additional terms, but only if neither party elected, for any reason whatever, to give the other party thirty days' notice of termination.

Throughout the years 1970-1972, BP suffered extremely heavy losses in all of its departments including marketing, and by the fall of 1972, it had withdrawn marketing operations in several states and was re-evaluating its sales program in the Washington, D.C. area. Eventually BP, to prevent or reduce such losses, was forced to decide to change its entire method of marketing by discontinuing wholesaling to independent dealers and by selling its products directly to the public at employee-operated stations. These outlets were to be high volume, no-frill, Gas & Go stations, providing

customers with gasoline and oil but no additional services or non-petroleum products.

In September of 1973 BP gave timely written notices to each of its Washington dealers, including Petitioners, that the leases and supply contracts would not be renewed upon their respective termination dates. In the notices of termination, BP offered each Petitioner employment as manager of a Gas & Go station, but each Petitioner refused to accept the offer.

In November 1973, Petitioners filed a five count complaint charging that BP and its parent company, Sohio,[1] had violated the Sherman Act by terminating Petitioners' leases and contracts as part of a price fixing conspiracy. The complaint also charged that both companies (a) had violated regulations of the Federal Energy Administration by changing BP's marketing methods, (b) had breached the dealers' current leases and contracts by giving the notices of non-renewal, and (c) had committed torts of common law deceit by BP's making fraudulent oral promises of lease renewals in perpetuity to each Petitioner.

In 1975 the case was tried in the United States District Court for the District of Maryland. The District Court directed a verdict in Respondents' favor on the Sherman Act count but submitted the other issues to the jury.

The jury found that Respondents had committed no breaches of contract or violations of the FEA regulations. It did, however, return large verdicts for each of the ten dealers upon the deceit count. Finding these verdicts (which aggregated $1,265,000) "grossly excessive and shocking to the conscience", the District Court ordered a remittitur of approximately half that amount.

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[1] In 1970, BP became a wholly-owned subsidiary of the Standard Oil Company (Sohio), which transacted no business in BP's East Coast territory.

Petitioners accepted the remittiturs under protest, and both sides appealed.

The Court of Appeals for the Fourth Circuit affirmed the directed verdict on the Sherman Act count, but reversed the judgment on the deceit count primarily because of the erroneous instructions on damages. It did not, however, remand for a new trial because (1) there was insufficient evidence of any damages to justify an award on any permissible state law theory, and (2) Petitioners could not have *reasonably relied* on BP's allegedly false oral promises, as is required by the Maryland law of deceit, since the alleged statements were directly contrary to the express termination provisions in Petitioners' written contracts with BP. The Court of Appeals also found that Petitioners, having accepted the remittiturs, could not object to them on appeal.

ARGUMENT

I.

PETITIONERS' ANTITRUST CLAIM IS BASED UPON THE ERRONEOUS PROPOSITIONS THAT A COMPANY CAN CONSPIRE WITH ITS OWN EMPLOYEES AND THAT IT IS ILLEGAL FOR A COMPANY TO DETERMINE THE PRICE AT WHICH ITS EMPLOYEES WILL SELL ITS PRODUCTS.

The core of Petitioners' contention is that BP's decision to market directly to the public through employee operated Gas & Go stations was a "price fixing scheme", since one of BP's objectives was to control the price at which it would sell its own products to consumers. Building on this premise, Petitioners next contend that BP's non-renewal of their leases and supply contracts constituted a refusal to deal in furtherance of this scheme and that BP conspired with its Gas & Go station employees to fix prices.[2]

[2] Petitioners did not appeal from the District Court's rejection of their theory that BP and its parent, Sohio, were engaged in a horizontal conspiracy, and they do not seek to revive that theory in this Court (A. 9a n.4).

Both the District Court (A. 32a-33a) and the Court of Appeals (A. 8a-11a) found that Gas & Go managers were *bona fide* BP employees and not independent dealers. The application of well-settled antitrust law to this conclusion correctly led both courts to reject each of Petitioners' said contentions. (1) It is perfectly legal conduct for a company, lacking a monopoly, to set the price at which employee-operated outlets sell its own products. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). Thus BP's Gas & Go marketing plan was not a price-fixing scheme. (2) BP terminated Petitioners' leases and supply contracts upon their termination dates as a necessary preliminary to adopting the legal Gas & Go direct marketing plan. Thus, the non-renewals were not refusals to deal in furtherance of any illegal price-fixing scheme. *Knutson v. The Daily Review, Inc.*, 584 F.2d 795 (9th Cir. 1977). (3) A corporation cannot conspire with its own employees. Thus, there could be no conspiracy to fix prices between BP and its Gas & Go managers. *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969).

Citing *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), Petitioners argue that BP's Gas & Go managers were not employees *at the time* BP successfully solicited them to run its stations; therefore, the managers were legally capable of conspiring with BP. Nothing in *Albrecht* lends any support to this fanciful theory. In that case a newspaper wholesaler conspired with a circulation company and an independent distributor to coerce the plaintiff, another independent distributor, to lower his retail newspaper price. In footnote 6, this Court said that a conspiracy might also have existed between the wholesaler and independent distributors (including plaintiff) who adhered under duress to the illegal resale price policy. Both the Court of Appeals (A. 9a) and the District Court (A. 31a) were aware of and correctly cited *Albrecht* as indicating that BP might

have been guilty of price-fixing had its Gas & Go managers not been *bona fide* employees. Since they were employees, BP could not conspire with them and could legally determine BP's prices at which they could sell.

Uncontradicted basic facts established that BP's Gas & Go managers were *bona fide* employees of BP completely different from the consignees in *Simpson*. BP paid these managers commissions and a guaranteed minimum salary and all station operating costs except the wages of subordinate station helpers and cash shortages. BP even paid the FICA, unemployment, workmen's compensation and social security taxes on all of the station employees including the managers, all bookkeeping expenses and bore all losses of products due to leakage, etc. The only benefit a salaried manager received which was not given a Gas & Go manager was one week's vacation each year.

Petitioners seem to contend that this case provides some vehicle for clarifying issues raised but unanswered in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 45 U.S.L.W. 4828 (U.S. June 23, 1977). The reasonableness of BP's Gas & Go marketing plan was obvious. Both the Court of Appeals (A. 11a) and the District Court (A. 36a) found that BP's non-renewal of Petitioners' leases and adoption of direct marketing was a reasonable reaction to the heavy losses it was sustaining while marketing in the conventional way. In fact, the District Court held that Petitioners had "failed entirely" to prove that BP's actions had any anticompetitive effect (A. 36a-37a).

II.

THE COURT OF APPEALS PROPERLY REVERSED THE JUDGMENT ON PETITIONERS' DECEIT COUNT SINCE, AS A MATTER OF MARYLAND LAW, THERE WAS INSUFFICIENT EVIDENCE TO RAISE A JURY QUESTION.

Petitioners claim that they renewed their short-term leases and contracts in reliance upon BP's fraudulent oral assurances that it would never exercise its contractual right of non-renewal. The Court of Appeals found, as a matter of law, that Petitioners had failed to establish two of the five essential elements of common law deceit under Maryland law. They could not prove reasonable reliance upon the alleged oral promises. They could not establish that they had sustained any damages as the result of them.

Petitioners argue (1) that the Court of Appeals exercised overly-broad review of a common law claim over which the federal courts have only pendant jurisdiction, (2) that the reversal of the jury verdict thus denied Petitioners the right to a jury trial, and (3) that the Court of Appeals misconstrued the law of Maryland.

All of these contentions are frivolous. Their argument is that the Court of Appeals had no power to review and reverse a district court's erroneous conclusions as to state law. Under Rule 52(a) of the Federal Rules of Civil Procedure, the findings of fact of a district court are not to be set aside unless clearly erroneous. Its conclusions of law are reviewable, however, without any such limitation. 9 Wright & Miller, *Federal Practice and Procedure*, §2588, p. 740 (1971).[3]

It is true that appellate courts will normally give substantial weight to determinations of state law by the

[3] The circuit courts exercise appellate review of the district courts in their respective circuits by authority of 28 U.S.C. §1291.

local district judge, especially when there is no direct state authority on the legal issue in question. This doctrine does not, however, strip appellate courts of the power to set aside wrong constructions of state law. *Robinson v. United States*, 518 F.2d 1105, 1108-09 (9th Cir. 1975); *Freeman v. Continental Gin Co.*, 381 F.2d 459, 466 (5th Cir. 1967); *Darby's Estate v. Wiseman*, 232 F.2d 792, 795-96 (10th Cir. 1963); 9 Wright & Miller, *supra*, §2588, pp. 752-53.

After an extensive review of the Maryland cases, the Court of Appeals concluded that there was insufficient evidence to justify a damage award under any theory. The sufficiency of the evidence is a question of law. 9 Wright & Miller, *supra*, §2524, pp. 541-542.[4]

The Court of Appeals also found under the authority of *James v. Goldberg*, 256 Md. 520 (1970)[5] that Petitioners had no right to rely upon BP's allegedly fraudulent oral promises that directly contradicted the clear termination provisions of their written contracts with BP. The construction of instruments is also a question of law not of fact. *Murphy v. Travellers Insurance Company*, 534 F.2d 1155, 1162, n.7 (5th Cir. 1976); *First National Bank of Miami v. Insurance Company of North America*, 495 F.2d 519, 522 (5th Cir. 1974).

Although these issues of Maryland law came before the Court of Appeals under its pendant jurisdiction, the

[4] There was no potential conflict between State and Federal law since the standard of sufficiency of the evidence as applied both by the State courts of Maryland and the Court of Appeals is substantially the same. *Tully v. Dasher*, 250 Md. 424 (1968); 9 Wright & Miller, *supra*, §2525, pp. 549-52.

[5] In this case, the highest court in Maryland upheld a directed verdict against plaintiffs in a deceit action, holding that they had no right to rely on oral statements that conflicted with the clear provisions of a written contract.

Court was entitled and, indeed, bound to review them. *United Mineworkers of America v. Gibbs*, 383 U.S. 715 (1966); 9 Wright & Miller, *supra*, §2588, pp. 752-53. The Petitioners cannot invoke pendant jurisdiction without also invoking appellate review.

Petitioners' suggestion that the reversal of the jury verdict denied them a jury trial is completely untenable. There was, as a matter of law, no issue for the jury to consider. Their last argument, that the Court of Appeals was wrong in applying Maryland law, is also insupportable, as a reading of the Court's well-reasoned and correct opinion makes clear.

III.

THE COURT OF APPEALS WAS CORRECT IN DECIDING THAT A PLAINTIFF CANNOT APPEAL FROM A REMITTITUR WHICH IT ACCEPTED.

The Petitioners ask this Court to resolve an alleged conflict among the circuits over whether a plaintiff may appeal from a remittitur it accepted under protest. There is no such conflict. As the Court of Appeals correctly noted, *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), resolved this question. This Court, in a *per curiam* decision, stated:

> "The Court of Appeals properly followed our precedents in holding that a plaintiff cannot 'protest' a remittitur he has accepted in an attempt to open it to challenge on appeal. A line of decisions stretching back to 1889 has finally established that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed. . . ." 429 U.S. 649.

The Court of Appeals reversed the jury's damage award and thereby mooted any issue of remittitur as well.

CONCLUSION

For the above reasons, this Court should not issue a Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals for the Fourth Circuit, which is valid in all respects.

Respectfully submitted,

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